IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1301

MARION EDWARD WILLIAMS,

Petitioner,

—v.—

STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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October Term, 1969

No. .....

Marion Edward Williams,

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—v.—

State of Iowa,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Iowa, entered on October 14, 1969, affirming the judgment of the District Court of Polk County finding petitioner guilty of failure to keep proper records of narcotic drugs in violation of Section 204.9 of the 1966 Code of Iowa.

Opinion Below

The opinion below is reported at —— Iowa ——, 171 N.W.2d 521 and is set forth in the Appendix hereto, pp. 1a-17a, *infra*. There was no opinion in the court of first instance, the District Court of the State of Iowa in and for Polk County.

Jurisdiction

The judgment of the Supreme Court of Iowa was entered on October 14, 1969 (Appendix, pg. 1a, *infra*). On December 8, 1969, the Iowa Supreme Court denied a petition for rehearing without opinion.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights guaranteed by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment of the Constitution of the United States.

This case also involves the following Iowa statutes:

§204.8(5) of Chapter 204 of the 1966 Iowa Code:

> Except as otherwise provided, this chapter shall not apply to the administering, dispensing, or selling of any preparation containing not more than one grain (64.8 mg) of codeine, or any of its salts, per one fluid ounce (29.5729 c.c.) or per one avoirdupois ounce (28.3 gms.), when such pharmaceutical preparations of narcotic drugs are administered, dispensed, or sold by persons and under conditions prescribed by the board.

§204.9 of Chapter 204 of the 1966 Iowa Code:

> Medical practitioners, manufacturers, wholesalers, pharmacies, pharmacists, hospitals, laboratories, and every person who purchases for resale or who sells narcotic drugs, shall keep such records as may be required by the board relating to receipt, manufacture, inventory, distribution, including dispensing, ad-

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ministering, sale, or other disposition, and information as to narcotics stolen, lost, or destroyed. In every case the record of narcotic drugs received shall show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered, or dispensed and the kind and quantity of drugs.

Every such record shall be kept for a period of five years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws containing substantially the same information as is specified by this chapter, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft.

Sections 204.5(1)(a), 204.5(2), 204.6(1), 204.6(3), 204.8, 204.9, and 204.17 of Chapter 204 of the 1966 Code of Iowa are set out in full in the Appendix, pp. 18a-23a, *infra*.

Question Presented

Petitioner, a licensed pharmacist, was sentenced to two years in prison for failure to keep proper records of his

purchases and sales of two cough syrups, each of which contains one grain or less of codeine per ounce. Prior to 1966, the Iowa Code provided that pharmacists must keep a record of purchases and sales of drug preparations such as the cough syrups, §204.9(4) of the 1962 Code of Iowa, but this provision was repealed in 1966. Section 204.8(5) of Chapter 204 of the 1966 Code clearly provides that the chapter shall not apply to the administering, dispensing or selling of these cough syrups, and the Iowa Board of Pharmacy Examiners, an agency of the State, furnishes a manual entitled "The Pharmacy Laws of Iowa" to all Iowa pharmacists with the following notice prominently displayed on the inside of the manual's cover: *"Pharmacists Please Note:* Preparations containing *only* one grain or less of Codeine per ounce are exempt under Iowa Law."

Under these circumstances was the Iowa Supreme Court's construction of the 1966 Code of Iowa to require pharmacists to keep a record of purchases and sales of these cough syrups so unforeseeable as to deprive petitioner of the fair warning that his conduct was criminal to which the Due Process Clause of the Fourteenth Amendment entitles him?

Statement

Petitioner, a licensed pharmacist, was indicted on June 5, 1968, for failure to keep proper records of narcotic drugs in violation of §204.9 of the Iowa Uniform Narcotic Drug Act, Chapter 204 of the 1966 Code of Iowa (set forth at pg. 2, *supra*) (R. 3-4).[1] The indictment was based on an audit conducted one and one half years earlier on

[1] The following abbreviations are employed in this Statement in citations to the certified record: record in the trial court—*R;* appellant's brief in the Iowa Supreme Court—*App. Br.;* Iowa State's

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January 4, 1967, by the Iowa Board of Pharmacy Examiners at the Williams Prescription Pharmacy, which petitioner has owned and operated in Des Moines, Iowa, for approximately nine years[2] (R. 4, 69-70). Petitioner was specifically charged with having failed to keep complete records of his purchases and sales of Robitussin A-C and Elixir Terpin Hydrate and Codeine, two cough syrups containing not more than one grain of codeine per fluid ounce in combination with other non-narcotic medications, between July 1, 1966, and December 31, 1966 (R. 4, 15, 43, 46, 70-71).

Prior to his trial, petitioner moved to quash the indictment on the ground that Chapter 204 of the 1966 Code of Iowa specifically provides in §204.8(5) that the " . . . chapter shall not apply to the administering, dispensing, or selling of . . . pharmaceutical preparations of narcotic drugs" such as Robitussin A-C and Elixir Terpin Hydrate and Codeine (R. 8-9, 16-17). The trial court ruled that pharmaceutical preparations such as the cough syrups are exempt from the prescription requirement of Chapter 204 but not from the record keeping requirement of

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brief in the Iowa Supreme Court—*St. Br.;* petition for rehearing—*Pet. Reh.;* application of Iowa Medical Society to appear as amicus curiae—*App. I.M.S.;* brief of Iowa Medical Society amicus curiae—*Br. I.M.S.*

[2] On the date of his indictment, petitioner was one of the two black pharmacists who owned and operated pharmacies in the State of Iowa (Pet. Reh. 44). Petitioner has been active in the National Association for the Advancement of Colored People for almost twenty years, having served as a member of the Iowa State executive board of that organization. In the interim between the January, 1967 audit and his indictment one and one half years later, petitioner had strongly criticized the Des Moines City Council for neglecting the welfare of the black community in that city. In addition, in March, 1968, petitioner had sued a Des Moines police officer for false arrest; that case is presently pending.

§204.9 and denied petitioner's motion (R. 14). The court stated no reason or authority in support of its ruling.

Petitioner was brought to trial before a jury in the District Court for Polk County on September 30, 1968 (R. 15). The State failed to establish that petitioner had not kept proper records of his *sales* of the cough syrups.[3] The State's case against petitioner consisted solely of evidence that subsequent to the audit at petitioner's pharmacy, investigators from the Board of Pharmacy Examiners examined the records of two drug wholesalers and found that petitioner had failed to produce several invoices containing *purchases* of Robitussin A-C and Elixir Terpin Hydrate and Codeine at the time of the audit[4] (R. 32-33). The evidence was undisputed that the Board of Pharmacy Examiners never contacted petitioner subsequent to the date of the audit to inform him that his record of purchases of the cough syrups appeared to be incomplete[5] (R. 42, 79). Petitioner first learned of this upon his indictment one and one half years after the audit.

At the close of the State's evidence, petitioner moved for a directed verdict of acquittal on the ground that the State had failed to establish a prima facie case and on the grounds previously stated in his motion to quash the

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[3] The only Board of Pharmacy Examiners' investigator who testified admitted that he did not ask to see petitioner's prescription files (R. 27-28, 35) and that a substantial number of sales of the cough syrups might be recorded in those files and therefore not appear in the audit upon which the indictment was based (R. 36). (See also petitioner's testimony at R. 70-71.)

[4] In its brief in the Iowa Supreme Court, counsel for the State stated:

> "Therefore, the fact that a complete audit of sales was not made is immaterial, as defendant was guilty of not keeping records of purchases," (St. Br. 15).

[5] In fact the Board renewed petitioner's pharmacist license twice during the interim between the audit and petitioner's indictment (Pet. Reh. 45).

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indictment (R. 67). In addition petitioner pointed out that §204.9 provides:

> . . . [P]harmacists . . . shall keep such records *as may be required by the board*[6] relating to receipt, manufacture, inventory, distribution, including dispensing, administering, sale, or other disposition, and information as to narcotics stolen, lost, or destroyed (R. 67). (Emphasis added.)

The State's evidence affirmatively established that the Board of Pharmacy Examiners had passed no rules or regulations requiring record keeping (R. 47, 67).

The State opposed the motion for a directed verdict of acquittal on the ground that the exemption provided in §204.8(5) is ineffective without some affirmative action by the Board. §204.8(5) provides that the pharmaceutical preparations shall be exempt from the application of Chapter 204 when " . . . administered, dispensed, or sold by persons and under conditions prescribed by the board." The attorney for the State argued:

> I think a close reading of 204.8 Subparagraph 5, indicates that that exemption is conditional on the Board's action. I apply the reverse of what Mr. Rockwell [counsel for petitioner] says and say yes, no rules and regulations have been adopted setting forth conditions under which these items can be sold, and as long as no regulations or rules have been adopted in regard to these items, they are not exempt from 204.9.
>
> In other words, it says at the end of 204.8, Subparagraph 5, this exemption shall not apply unless there are conditions set forth by the Board (R. 68-69).

[6] "Board" means the Board of Pharmacy Examiners. §204.1(16), 1966 Code of Iowa.

Petitioner's motion for a directed verdict was denied (R. 69).

At the close of all of the evidence, petitioner made a motion for a directed verdict which was denied (R. 84-85). The trial judge then instructed the jury, over petitioner's objection, that the terms of §204.8(5) do not exempt the cough syrups from the record keeping requirement of §204.9 (R. 85):

> *Instruction No. 5.* You are further instructed that there are certain preparations containing narcotics *that are exempt from the provisions of Chapter 204* of the 1966 Code of Iowa, and these are referred to as Class X narcotics.[7] Class X narcotics, such as Robitussin A-C and Elixir Terpin Hydrate and Codeine are exempt from prescription requirements, but due to the narcotic content, are subject to being made of record, as provided in Section 204.9 (R. 89). (Emphasis added.)

On October 1, 1968, petitioner was found guilty of failure to keep proper records (R. 95) and on October 14 sentenced to two years in the state penitentiary and a two thousand dollar fine (R. 100-101).

On October 14, 1969, the Iowa Supreme Court affirmed petitioner's conviction and sentence (Appendix, pg. 1a, *infra*). Petitioner filed a petition for rehearing on November 12, 1969. On December 5, 1969, the Iowa Medical Society applied to the Iowa Supreme Court to appear as amicus curiae, stating:

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[7] "Class X" is a federal classification (see 26 C.F.R. §151.422(6)) employed to designate pharmaceutical preparations containing a narcotic drug which may be sold without a prescription. The term "Class X" appears nowhere in the Iowa Uniform Narcotic Drug Act, Chapter 204 of the 1966 Code of Iowa.

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> This is a case of first impression and the particular question involved in this appeal has never before been decided by the State of Iowa (App. I.M.S. 1).

On that same date, the Iowa Medical Society was granted permission to appear and file a Brief Amicus Curiae. In its Brief, the Medical Society stated:

> In our view, the exemption in Section 204.8(5) extends to the record keeping requirements contained in Section 204.9. Accordingly, Williams would seem to have been sentenced to two years in the state penitentiary, for failure to keep records which *we believe the clear language of the applicable statute does not require.* Further, although the Board of Pharmacy Examiners had the power under Section 204.8(5) to condition the exemption, the Board not only failed to condition the exemption, but also has acted affirmatively to lead pharmacists and others to believe that this exemptive provision was to be broadly construed.[8] (Br. I.M.S. 3). (Emphasis added.)

The Medical Society characterized the Iowa Supreme Court's construction of the statute as a "questionable interpretation of the law which is contrary to the clear and natural meaning of a reasonably unambiguous statute," (Br. I.M.S. 4).

On December 8, 1969, the Iowa Supreme Court denied petitioner's petition for rehearing without opinion.[9] On

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[8] The affirmative action referred to by the Medical Society is the fact that the Iowa Board of Pharmacy Examiners, an official state agency, furnishes a manual entitled "The Pharmacy Laws of Iowa" to all Iowa pharmacists with the following notice prominently displayed on the inside of the manual's cover: *"Pharmacists Please Note:* Preparations containing *only* one grain or less of Codeine per ounce are exempt under Iowa Law." (Br. I.M.S. 17).

[9] Petitioner applied to the Iowa Supreme Court for a stay of incarceration pending review by this Court (Application in Iowa

January 15, 1970, petitioner applied to the Honorable Byron White, Circuit Justice for the Eighth Judicial Circuit, for a stay of the judgment of the Iowa Supreme Court issued on October 14, 1969, and a stay of petitioner's incarceration pending review by the Supreme Court of the United States (Application for Order Directing Execution of Procedendo). Justice White granted the State of Iowa until January 23, 1970, to file written objections to petitioner's application (*Ibid*).

On January 19, 1970, petitioner applied to the District Court of Polk County for a hearing to consider him for a bench parole,[10] and in addition for a temporary stay of incarceration until such time as his application for parole could be heard[11] (*Ibid*). On that same date, Judge Holliday of the District Court by ex parte order stayed petitioner's incarceration until January 26, 1970, at which time petitioner's application for parole was to be heard (Order Directing Execution of Procedendo).

On January 22, 1970, upon the application of the State of Iowa, a three-judge panel of the Iowa Supreme Court

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Supreme Court for Temporary Stay); the application was denied and on December 17, 1969, petitioner was taken into custody (Order Directing Execution of Procedendo). On December 19, 1969, the District Court of Polk County granted petitioner a stay of incarceration until January 19, 1970, and petitioner was released from custody on his own recognizance (*Ibid.*).

[10] A bench parole is the Iowa equivalent of probation. 1966 Code of Iowa. No parole hearing had theretofore been held because Judge Holliday, who presided over petitioner's trial, had erroneously believed that Iowa law did not permit a bench parole in petitioner's case.

[11] January 19 was the date on which the stay previously ordered by the District Court was to expire. A further stay was necessary because an Iowa court cannot grant a bench parole once a defendant has been imprisoned. §247.20, 1966 Code of Iowa. In addition to issuing the stay, Judge Holliday ordered the Polk County Attorney's Office to conduct a presentence investigation of petitioner.

held, with one judge dissenting, that the District Court had no jurisdiction to grant a stay (*Ibid*). The Court ordered that the District Court's stay of petitioner's incarceration be set aside, and further ordered that petitioner be incarcerated in the penitentiary. On that same date, without prior notice to petitioner or his attorneys of the order of the Iowa Supreme Court, petitioner was taken into custody and transported to the state penitentiary. Petitioner's incarceration in a penitentiary rather than in a county jail deprived the Polk County District Court of jurisdiction to consider petitioner for probation. §247.20, 1966 Code of Iowa.

On January 27, 1970, Justice White ordered that execution and enforcement of petitioner's sentence be stayed pending disposition of an appeal or petition for certiorari to this Court.

How the Federal Question Was Raised and Decided Below

Petitioner raised the objection that the Iowa Uniform Narcotic Drug Act, Chapter 204 of the 1966 Code of Iowa, expressly exempts the cough syrups from the Act's application including its record keeping requirement repeatedly throughout his trial.[12] On each occasion, the trial court overruled petitioner's objection. Petitioner alternately ob-

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[12] Petitioner relied on this ground in his motion to quash the indictment (R. 8-9) which was denied (R. 14), in his motion for a directed verdict of acquittal at the close of the State's evidence (R. 68) which was denied (R. 69), in his motion for a directed verdict at the close of all evidence (R. 85) which was denied (R. 85), in his objections to instructions to the jury (R. 85) which were overruled (R. 85, 88-89), and in his motion for judgment notwithstanding the verdict (R. 97) which was denied (R. 100).

jected that the record keeping provisions of the Act are ambiguous.[13] The trial court also overruled this objection.

On appeal to the Iowa Supreme Court, petitioner reasserted these objections. In response to petitioner's claim that the record keeping provisions of the Act are unconstitutionally vague and indefinite, the Iowa Supreme Court applied the test promulgated by this Court in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926):[14]

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. (Opinion of Iowa Supreme Court, pg. 11a, *infra.*)

The Iowa Supreme Court then summarily held:

> Applying the foregoing principles, we must reject the contention the statute is so vague and indefinite as to violate due process (pg. 11a, *infra*).

In response to petitioner's objection that the Act clearly excepts the cough syrups from its requirements including that of record keeping, the Iowa Supreme Court noted that it was a problem of first impression and then concluded:

> The plain wording of that section [204.8(5)] says only narcotic preparations of a certain strength shall

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[13] Petitioner relied on this ground in his motion to quash the indictment (R. 16) and in his motion for a directed verdict at the close of the State's evidence (R. 67).

[14] In quoting the *Connally* rule verbatim, the Iowa Supreme Court did not cite *Connally* directly, but rather cited *State* v. *Coppes*, 247 Iowa 1057, 1061-62, 78 N.W.2d 10, 13-14 (1956), wherein the Iowa Supreme Court had also quoted the *Connally* rule verbatim and had cited *Connally*.

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not be subject to the administering, dispensing and selling provisions of the chapter. It says nothing about any exemptions from record keeping, licensing or the penalty provisions of the chapter. Record keeping is entirely separate from administering, dispensing or selling.

. . . . .

We conclude the exemption provided in section 204.8(5) does not apply to the record keeping requirements of section 204.9. (Opinion of Iowa Supreme Court, pp. 12a-13a, *infra.*)

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Determine Whether Petitioner Has Been Deprived of the Fair Warning to Which the Due Process Clause of the Fourteenth Amendment Entitles Him When Sentenced to Two Years in Prison Pursuant to an Unforeseeable and Strained Construction of a State Statute.

Petitioner, a licensed pharmacist, was convicted of the felony of failure to keep proper records of his purchases of two cough syrups, each of which contains one grain or less of codeine per ounce, in violation of §204.9 of the 1966 Code of Iowa, and sentenced to two years in the state penitentiary. Petitioner claims that he has been convicted as a felon pursuant to a strained and unforeseeable construction of §204.9 by the Iowa Supreme Court, in violation of his constitutional right to fair warning of the conduct that §204.9 makes a crime.

On appeal to the Iowa Supreme Court, petitioner asserted that the clear language of the statute exempts the cough syrups from its record keeping requirement. Petitioner's understanding of the record keeping requirement

was affirmed by the Iowa Medical Society, which filed a brief amicus curiae in the Iowa Supreme Court in support of petitioner's petition for rehearing. The Iowa Supreme Court noted that the question was one of first impression, and construed the statute to require the keeping of records of purchases and sales of the cough syrups.

Although the record keeping requirement of Chapter 204 has been clarified by the Iowa Supreme Court in petitioner's case, at the time of the audit of petitioner's pharmacy on which petitioner's conviction was founded, there were substantial reasons to believe that Iowa law did *not* require pharmacists to keep a record of purchases and sales of the cough syrups. Iowa narcotics law had been significantly revised in 1966. Prior to 1966, Chapter 204 provided in §204.8 that the chapter shall not apply to the administering, dispensing, or selling of drug preparations containing not more than one grain of codeine per ounce except as otherwise provided; this provision was reenacted in 1966. However, in §204.9, the record keeping provision, the chapter provided prior to 1966:

> (4) Every person who purchases for resale, or who sells narcotic drug preparations exempted by section 204.8, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection five of this section.[15] 1962 Code of Iowa.

This provision was repealed in 1966.

Thus it appeared that pharmacists were no longer required under the 1966 Code (effective July 4, 1966) to

[15] This provision is contained in the Uniform Narcotics Drug Act (see 9B Uniform Laws Annotated §9(4), pg. 490), upon which Chapter 204 of the Iowa Code is modeled, and is contained in the laws of most other states which have adopted the Uniform Act (Br. I.M.S. 12, 22).

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keep a record of purchases and sales of codeine-containing cough syrups.[16] This conclusion was affirmed in a manual published for pharmacists by the Iowa Board of Pharmacy Examiners, an official state agency. The manual, entitled "The Pharmacy Laws of Iowa", contains the following notice prominently displayed on the inside of its front cover:

> *Pharmacists Please Note:*
>
> Exempt narcotic classification:
>
> Preparations containing *only* one grain or less of Codeine per ounce are exempt under Iowa Law. Preparations containing other Opium derivatives in any amount are not exempt under Iowa Law even though they are exempt under Federal Law.[17]

This unqualified declaration of the Iowa Board of Pharmacy Examiners that preparations such as the codeine-containing cough syrups are "exempt under Iowa law" is especially significant in light of the authority which Chap-

[16] In its opinion the Iowa Supreme Court stated: "It is interesting to note defendant apparently knew and understood he was required to keep a record of his purchases and sales of Robitussin A-C as upon the request of the inspectors he without any protest or questions handed over to them some invoices and his registry book." (Appendix, pg. 13a, *infra.*) The evidence was undisputed that petitioner's "registry book" was a record *in compliance with federal law* of persons who purchase the cough syrups without a prescription (R. 70-71, 79). That petitioner retained invoices because he believed he was required by state law to keep a record of purchases of cough syrups is debatable, in view of the undisputed evidence that the invoices contained purchases of many items in addition to the cough syrups (R. 64). There are many plausible reasons that the owner of a business such as a pharmacy would retain invoices covering his purchases of the preceding six months.

[17] This notice has been contained in all editions of the manual published since at least 1966 (Br. I.M.S. 16).

ter 204 delegates to the Board. Section 204.8 authorizes the Board to prescribe conditions under which the exempt preparations may be sold, §204.8(5), or to terminate the exemption, §204.8(3). Section 204.9 provides that pharmacists shall keep such records "as may be required by the board". In 1966, the Board had promulgated no rules or regulations regarding record keeping or the exemption of codeine-containing cough syrups. In its brief amicus curiae, the Iowa Medical Society described the general reaction to the Board's action:

> . . . the Board not only failed to condition the exemption [under Section 204.8(5)], but also has acted affirmatively to lead pharmacists and others to believe that this exemptive provision was to be broadly construed. (Br. I.M.S. 3).

In addition to the legislative history and the affirmative action of the Board of Pharmacy Examiners, the terms of sections 204.8(5) and 204.9 viewed within the context of other provisions of Chapter 204 suggest that the keeping of records of purchases and sales of codeine-containing cough syrups is not required. The exemption provision, §204.8(5), states:

> Except as otherwise provided, this chapter shall not apply to the administering, dispensing, or selling of any preparation containing not more than one grain (64.8 mg.) of codeine . . . per . . . ounce.

Immediately following §204.8(5) is a cross-reference to §204.17(7). Section 204.17 proscribes procurement of narcotic drugs by fraud or deceit, and in subsection 7 provides:

> The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section 204.8, in the same way as they apply to

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transactions under all other sections. (Appendix, pg. 23a, *infra*.)

This is the only section in Chapter 204 which provides in express terms that it shall apply to preparations otherwise exempted by §204.8. That the legislature included this express provision in section 204.17 and included no such provision in section 204.9, the record keeping provision, supports the conclusion that the legislature did not intend to require the keeping of records of codeine-containing preparations.

There is also evidenced by subsection 4 of §204.8 (pg. 20a, *infra*), which sets forth the conditions to which pharmaceutical preparations exempted from the chapter shall be subject. No condition is set forth in this subsection regarding the keeping of records.

Petitioner's case reveals that if the exemption contained in §204.8(5) was not intended to exempt the codeine-containing cough syrups from the record keeping requirement in §204.9, then there was significant confusion about what the exemption was intended to do. The Secretary to the Board of Pharmacy Examiners and Director of the Narcotic Division testified for the State that the §204.8(5) exemption applies *only* to the prescription requirement of §204.6 (pg. 18a, *infra*) (R. 42, 46). Counsel for the State argued before the trial court and on appeal to the Iowa Supreme Court that the exemption is *ineffective* without some affirmative action by the Board,[18] because §204.8(5) provides that the codeine-containing preparations shall be exempt from the application of Chapter 204 when ". . . ad-

[18] A pharmacist could have concluded justifiably, as the Iowa Medical Society argued to the Iowa Supreme Court, that the notice that codeine-containing preparations "are exempt" displayed prominently on the Board's own manual (see n. 8, *supra*) was such affirmative action. (Br. I.M.S. 17-18).

ministered, dispensed, or sold by persons and *under conditions prescribed by the board,*" (R. 68-69; St. Br. 30-31) (emphasis added). The State's construction of the provision contradicted the testimony of its own expert witness that the exemption is *effective* insofar as the prescription requirement is concerned.

The Iowa Supreme Court did not delimit the scope of the exemption provided in §204.8(5), but the Court did declare that this exemption does not apply to the record keeping requirement of §204.9 (pg. 13a, *infra*). The court reasoned:

> The plain wording of that section says only that narcotic preparations of a certain strength shall not be subject to the administering, dispensing and selling provisions of the chapter. It says nothing about any exemption from record keeping, licensing or the penalty provisions of the chapter. Record keeping is entirely separate from administering, dispensing or selling. It is unreasonable to assume the legislature in the definition of narcotics included Robitussin A-C and Elixir Terpin Hydrate and Codeine as narcotics and then by section 204.8(5) took such preparations out of all provisions contained in chapter 204[19] (pg. 12a, *infra*).

Petitioner does not challenge the construction of Iowa law by the Iowa Supreme Court in this Court. Petitioner claims that, prior to the clarifying construction of the Iowa Supreme Court in his own case, sections 204.8(5) and 204.9 of the 1966 Code of Iowa ". . . violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits," *Bouie* v. *Columbia,* 378 U.S. 347, 350 (1964). The question is not whether the

[19] In view of the fact that the legislature expressly provided in §204.17(7) that §204.17 shall apply to drugs otherwise exempted by §204.8, this statement is incorrect.

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construction of the Iowa Supreme Court is correct. The question is whether petitioner was bound to understand the record keeping provision according to the construction later announced by the Iowa Supreme Court "in advance of judicial utterance upon the subject," *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456 (1939).

The construction announced by the Iowa Supreme Court in petitioner's case was unforeseeable.[20] In the first place, the 1962 Code of Iowa provided in §204.8:

> Except as otherwise in this chapter specifically provided, this chapter shall not apply to the following cases:
>
> Administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce . . . not more than one grain of codeine or of any of its salts. (Appendix, pg. 24a, *infra*.)

If the legislature considered record keeping "entirely separate from administering, dispensing, or selling", why did the legislature expressly provide in §204.9(4) of the 1962 Code that: "Every person who purchases for resale, or who sells narcotic drug preparations exempted by sections 204.8, shall keep a record . . .," (Appendix, pg. 25a, *infra*).

When subsection 4 of §204.9 was repealed in 1966, was petitioner bound to understand that records were nonetheless required? Was petitioner bound to understand that keeping records of his purchases and sales of the cough syrups was entirely separate from selling the preparations, when the obligation to keep records arises only when he is *sold* these preparations by a drug wholesaler or when he *sells* the preparations to the public?

[20] In its brief amicus curiae, the Iowa Medical Society stated: "Assume, however, that the court's construction of this statute is correct. We nonetheless doubt that the average pharmacist would have been likely to reach the same conclusion." (Br. I.M.S. 23).

In the second place, according to the testimony of the State's own witness, drug wholesalers accept telephone orders for these preparations and do not require official written orders[21] (R. 51-52). Section 204.5(1) of the 1966 Code (pg. 18a, *infra*) requires that wholesalers and manufacturers sell narcotic drugs only on official written orders. Written orders are apparently intended as a form of record keeping, because "each party to the transaction shall preserve his copy of such order for a period of five years," §204.5(2), pg. 18a, *infra*. Was petitioner bound to understand that he was required to preserve his copy of an official written order (although the Board of Pharmacy Examiners had not provided official order forms (R. 72)) because he was *purchasing* the cough syrups, while wholesalers are not required to preserve these records because they are *selling* the cough syrups? Was petitioner bound to understand that §204.8(5) does exempt wholesalers from the requirement that they sell only on official written orders but does not exempt pharmacists from the requirement that they keep a record of sales of the cough syrups?

The confusion is compounded when one questions why these cough syrups may be sold without a prescription but a record of their sale must be kept. Prescription orders are a form of record keeping as they must be retained for a period of five years "so as to be readily accessible for inspection by any public officer," §204.6(3), pg. 19a, *infra*. Was petitioner bound to understand that record keeping is entirely separate from selling but retaining prescription orders is not?

Whether this is a case where " . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction," *Bouie* v. *Columbia, supra*, 352,

[21] The Iowa Medical Society stated to the Iowa Supreme Court: "We have no doubt that this action by a wholesaler or manufacturer is both lawful and common practice in Iowa." (Br. I.M.S. 13.)

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or a case where an ambiguous statute has been retroactively clarified by judicial construction, see cases cited in Amsterdam, Note, 109 U. Pa. L. Rev. 67, 73-74 n. 34, the injury to petitioner is the same. He has been denied his right ". . . to be informed as to what the State commands or forbids," *Lanzetta* v. *New Jersey, supra,* 453.

Furthermore, the unqualified declaration that codeine-containing preparations are "exempt under Iowa law" prominently displayed in the manual of the Iowa Board of Pharmacy Examiners constitutes active misleading of a citizen by an agent of the State analogous to the misleading condemned in *Cox* v. *Louisiana,* 379 U.S. 559, 571 (1965)[22] and in *Raley* v. *Ohio,* 360 U.S. 423, 438 (1959).[23] In the words of the Iowa Medical Society:

> Certainly it is unseemly for the Board to tell pharmacists and others that these preparations are exempt under Iowa law and then cause a pharmacist to be convicted as a felon for acting in accordance with the Board's pronouncement. (Br. I.M.S. 17.)

In light of the repeal of subsection (4) of §204.9 in 1966, the fact that the Iowa Board of Pharmacy Examiners not only failed to use its authority to clarify the record keeping requirements of Chapter 204 but declared without qualification that the codeine-containing preparations are exempt,

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[22] In *Cox* this Court held that although the lack of specificity in the word "near" may not render the challenged statute unconstitutionally vague, demonstrators justifiably relied upon an administrative interpretation of how "near" the courthouse their demonstration might take place and that the Due Process Clause prevented conviction of the demonstrators. *Cox* v. *Louisiana, supra,* 568-69.

[23] In *Raley,* contempt convictions were held violative of the Due Process Clause where a State Commission had affirmatively advised the appellants that they could invoke the privilege against self-incrimination and refuse to answer the Commission's questions. *Raley* v. *Ohio, supra,* 425-26.

and the terms of sections 204.8(5) and 204.9 viewed in the context of Chapter 204, the Iowa Supreme Court's construction of §204.9 to require pharmacists to keep records of their purchases and sales of these cough syrups was so strained and unforeseeable as to deprive petitioner of the fair warning that his failure to keep such records was a felony, in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reason the writ of certiorari should issue as prayed and the judgment of the Iowa Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

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Opinion of Supreme Court of Iowa

IN THE SUPREME COURT OF IOWA

FILED OCTOBER 14, 1969

No. 148—53403

STATE OF IOWA,

Appellee,

v.

MARION EDWARD WILLIAMS,

Appellant.

Appeal from Polk District Court—
Gibson C. Holliday, Judge.

Defendant appeals from judgment on a verdict finding him guilty of failure to keep proper records of narcotic drugs in violation of section 204.9, Code, 1966.—Affirmed.

Rockwell & Jones, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Larry Seckington, Assistant Attorney General, and Ray Fenton, County Attorney, for appellee.

MOORE, J.

June 5, 1968 the Polk County grand jury returned an indictment charging Marion Edward Williams, a licensed pharmacist, with failure to keep proper records of narcotic drugs in violation of section 204.9, Code, 1966, to which, after an adverse ruling on his motion to quash or set aside the indictment, he entered a plea of not guilty. On trial a jury verdict of guilty was returned. October 14, 1968 the trial court entered judgment fining defendant $2000 and sentencing him to serve two years in the state penitentiary at Fort Madison. Defendant has appealed. We affirm.

Defendant asserts the trial court erred in (1) overruling his motion to quash indictment, (2) allowing the witness Raaz to testify regarding the accountability survey, (3) allowing exhibit 1 in evidence, (4) permitting the witness Crews to testify as to the law, (5) overruling his motion for directed verdict at the close of the State's evidence, (6) overruling his motion for directed verdict at close of all the evidence, (7) overruling his motion for judgment notwithstanding the verdict or new trial, (8) submitting instructions 4 and 5 and (9) imposing the sentence which was imposed upon him.

Section 204.19, Code, 1966, makes it the duty of the board of pharmacy examiners, all peace officers and county attorneys to enforce all provisions of the Uniform Narcotics Drug Act, chapter 204, Code, 1966.

January 4, 1967 Virgil A. Raaz and Clifford Wheeler, state pharmacy board inspectors, made an audit of Williams Prescription Pharmacy at 1103 University Ave. in Des Moines. On arrival they announced to defendant owner and operator of the pharmacy, they were there to conduct a class 'X' narcotics audit. They told defendant they wanted his exempt registry signature book and all invoices covering the same items and they would physically count the on-hand individual items.

The audit, which is also referred to in the record as an accountability survey, covered four-ounce Robitussin A-C (the C refers to codeine) and four-ounce Elixir Terpin Hydrate and Codeine for the period from July 1 to December 31, 1966. The only invoices produced by defendant of purchases of these two items were those from Des Moines Drug Company. They showed purchases on various dates between July 1 and December 31, 1966 totaling 2328 four-ounce bottles Robitussin A-C and 66 four-ounce bottles Elixir

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Terpin Hydrate and Codeine. The registry book showed sales of 1961 four-ounce bottles of Robitussin A-C and no sales of Elixir Terpin Hydrate and Codeine. After counting the stock on hand the inspectors prepared and made a part of the pharmacy board's records an audit report which is now exhibit 1 in the record.

As a follow-up on this audit or accountability survey Mr. Raaz checked invoices at Des Moines Drug and Iowa Drug Company in Des Moines for sale of the two items to defendant during the six months period being investigated. He found at Des Moines Drug invoices dated 7-19-66, 7-22-66, 7-26-66, 7-28-66, 7-29-66, 11-18-66, 11-22-66, 11-23-66, 11-28-66, 11-30-66, 12-2-66, 12-6-66, 12-7-66, 12-13-66, 12-16-66, 12-19-66, 12-21-66, 12-23-66, 12-29-66, showing sales to defendant of 546 bottles of Robitussin A-C making a total of 2874. None of these invoices were shown to the inspectors by defendant. Nine of them showed purchases of Elixir Terpin Hydrate and Codeine. The record discloses defendant paid cash for these purchases within two or three days after delivery. They totaled several hundred dollars.

Investigation at the Iowa Drug disclosed 29 invoices and defendant had purchased 1392 four-ounce bottles of Robitussin A-C during the six months period involved. He had produced none of these invoices when the inspectors requested all his invoices.

Thearl Hesecher, accountant for Des Moines Drug Company, identified the above listed invoices as part of the company's regular business records and testified the drugs listed thereon had been paid for by defendant. Evidence of defendant's purchase of the 1392 four-ounce bottles of Robitussin A-C at the Iowa Drug Company was initially introduced and fully developed on cross-examination of State's witness Raaz.

Class 'X' narcotics is a federal classification of narcotic preparations which do not require a prescription to make a purchase thereof. The record, however, establishes federal regulations require a pharmacist keep a record of those to whom Class 'X' narcotics are sold.

Paul Crews, secretary to the board of pharmacy examiners and director of the narcotic division, a registered pharmacist since 1939, testified: "A class 'X' narcotic contains a narcotic medication within certain limitations of amounts, and also in combination with other drugs and medicine which are not narcotic. Neither Elixir Terpin Hydrate and Codeine or Robitussin A-C contains more than one grain of Codeine per fluid ounce. Codeine is a narcotic drug derived from the parent material gum opium. * * * Codeine is derived from this morphine base and codeine is classified as a narcotic drug. The usual dosage of Codeine depending upon the condition it is prescribed for, for an average adult, probably would be a fourth of a grain, and a physician may prescribe two, three, maybe up to a maximum of four doses a day for a short period of time, depending upon the existing condition. Robitussin A-C and Elixir Terpin Hydrate and Codeine contain either sixteen or eight times the normal dosage per four ounce bottle."

On cross-examination by defendant's counsel Crews testified Class 'X' narcotics, one of which is Robitussin A-C, is exempt from prescription requirements but not exempt from other requirements. On redirect examination, over defendant's objection, Crews testified Robitussin A-C is exempt from prescription requirements under the Iowa law but all record keeping requirements must be maintained as to receipt of the drug at the time of purchase and at the time of the sale of the drug. He stated further the board had not as of 1966 adopted additional rules or instructions on record keeping requirements.

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I. The main thrust of defendant's argument that the trial court erred in overruling his motion to quash, his motions for directed verdict, his motion for judgment notwithstanding the verdict or for new trial as well as his exception to instructions 4 and 5 is that Code section 204.8(5) is the pertinent statute rather than section 204.9. It is defendant's contention he was not required to keep records regarding his purchase and sale of the narcotic preparations, Robitussin A-C and Elixir Terpin Hydrate and Codeine. It is the State's position prescriptions were not required for these items but that is the extent of the exemption regarding resale thereof.

Code section 204.1(10) under definitions states: "'Narcotic drug' means any of the following, alone, in combination, or mixed with other ingredients:

"a. Opium, isonipecaine, cocoa leaves, or opiate.

"b. Any compound, manufacture, sale, derivative, or preparation of opium, isonipecaine, cocoa leaves, or opiate."

Code section 204.8 provides: "Preparations exempted. 1. The board may by regulation exempt from the application of this chapter to the extent it determines to be consistent with the public welfare, pharmaceutical preparations of narcotic drugs found by the board after due notice and opportunity for hearing.

"a. Either to possess no addiction-forming or addiction-sustaining liability, or to possess such slight addiction-forming or addiction-sustaining liability as to create little risk of improper use, and

"b. Not to permit recovery of a narcotic drug having such liability, with relative technical simplicity and degree of yield as to create a risk of improper use.

"2. In exercising the authority granted in subsection 1 of this section, the board, by regulation and without special findings, may grant an exempt status to such pharmaceutical preparations of narcotic drugs as are or may be determined to be exempt under the federal narcotics laws and regulations and permit the administering, dispensing, or selling of such preparations under conditions and by persons the board may prescribe.

"3. If the board shall determine that any exempt preparation does possess a degree of addiction liability that, in its opinion, results in abusive use, the board shall by regulation publish its determination. The determination shall be final and the exempt status shall cease to apply to such preparation sixty days after the publication date of the determination.

"4. Pharmaceutical preparations of narcotic drugs exempted from this chapter shall be subject to the following conditions:

"a. The preparation administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.

"b. The preparation shall be administered, dispensed, or sold in good faith as a medicine, and not for the purpose of evading the provisions of this chapter.

"c. Only a pharmacist shall sell at retail or dispense such a preparation.

"5. Except as otherwise provided, this chapter shall not apply to the administering, dispensing, or selling of any

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preparation containing not more than one grain (64.8 mg.) of codeine, or any of its salts, per one fluid ounce (29.5729 c.c.) or per one avoirdupoise ounce (28.3 gms.), when such pharmaceutical preparations of narcotic drugs are administered, dispensed, or sold by persons and under conditions prescribed by the board."

It appears without dispute the board of pharmacy examiners had not adopted any exemption from the application of the provisions of chapter 204. The question presented is whether subdivision 5 of section 204.8 exempts from record keeping such narcotic preparations as described therein.

Code section 204.9 provides: "Records to be kept. Medical practitioners, manufacturers, wholesalers, pharmacies, pharmacists, hospitals, laboratories, and every person who purchases for resale or who sells narcotic drugs, shall keep such records as may be required by the board relating to receipt, manufacture, inventory, distribution, including dispensing, administering, sale, or other disposition and information as to narcotics stolen, lost, or destroyed. In every case the record of narcotics drugs received shall show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered, or dispensed and the kind and quantity of drugs.

"Every such record shall be kept for a period of five years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws containing substantially the same information as is specified by this chapter, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft."

It is the State's position, with which the trial court agreed and so stated in instructions 4 and 5, that under section 204.9 defendant was in every case required to keep a record of narcotic drugs received, the date of receipts, the name and address of the person from whom received and of those to whom sold.

The problem presented is of first impression before this court. Similar problems have, however, been considered in other jurisdictions.

In Merritt v. State, Ind., 198 N.E.2d 867, defendant was charged under the Uniform Narcotic Drug Act of obtaining an "exempt" narcotic drug, paregoric containing opium, by giving a false name and address. In affirming defendant's conviction the Indiana court held the exemption ran only to purchase on prescription. At page 869 of 198 N.E.2d, the court said: "Viewing the Uniform Narcotic Act as a whole, it is obvious that it was the intent of the legislature that in certain instances it is not necessary to secure a physician's prescription to buy certain narcotic drugs with a minimum content of opium therein specified, and that paregoric containing less than two grains of opium was within that group and could be obtained without a prescription. However, it is also apparent that even though certain drugs containing a low percentage of a narcotic might be purchased without

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a physician's prescription, the law still required that a record be kept of the purchases and sales and to whom made."

Continuing on page 870 the court says: "In other words, a narcotic drug of a certain percentage or less may be exempt from part of the provisions of the Uniform Narcotic Act and not other provisions thereof. That, in our judgment, is the case here. The act does exempt paregoric containing two grains or less of opium from the provisions with reference to a physician's prescription, etc., but does not exempt the seller of such a drug from the requirement of keeping a record of the sales nor the buyer from the penal provision when obtaining the same by use of deceit, fraud or the use of a false name. This appears to be the construction given in other states where similar questions have arisen. State v. Lee (1963), 62 Wash.2d 228, 382 P.2d 491; State v. Sanchez (1962), 13 Utah 2d 307, 373 P.2d 605.

• • •

"From reading the act as a whole, it would seem that the purpose of the act requiring the druggist to keep a record of the sales and to whom made is that an accurate record be kept in order to determine whether the exempt narcotics are being used by an addict or diverted to an unlawful use and false names and addresses being used for that purpose."

In State v. Sanchez, 13 Utah 2d 307, 373 P.2d 695, defendant was convicted of obtaining a narcotic drug, paregoric, by fraud and deceit. In affirming the conviction the court held the statute providing that it shall not apply to administering, dispensing or selling at retail of any medicinal preparation containing not more than one grain of codeine in one fluid ounce is limited to administering, dispensing or selling at retail has no application to obtaining by fraud or deceit, a narcotic drug.

In State v. Goodwin, 181 Neb. 616, 150 N.W.2d 135, defendant's conviction of attempting to obtain a narcotic drug, Robitussin A-C, by misrepresentation under statutory provisions very similar to our chapter 204 was affirmed.

The Nebraska court at page 136, 150 N.W.2d, states:

"Robitussin A.C. is a commercial cough syrup which may be purchased without a prescription, but the transcription must be recorded. The evidence is undisputed that an ounce of syrup contained less than one grain of codeine phosphate. • • •

"Read literally or otherwise, the statutory language does not except transferees of the medicinal preparations from the penal section." (citations)

For other authority supporting the conclusion the exemption of certain drugs from prescription requirements does not bar prosecution for violation of other provisions of the narcotic statutes see Randle v. Calif. State Bd. of Pharmacy, 240 Cal.App. 2d 254, 49 Cal. Rptr. 405, 17 A.L.R.3d 1398; Baldwin v. Commonwealth, 203 Va. 570, 125 S.E.2d 858; Schenher v. State, Ala., 90 So.2d 234; People v. Rowlby, 51 Ill.App.2d 51, 201 N.E.2d 136.

Most of the authorities we have cited are reviewed in 25 A.L.R.3d 1118, section 5, pages 1127-1130. Folenius v. Eckle, 109 Ohio App. 152, 164 N.E.2d 458, and Stone v. Sacks, Ohio App., 191 N.E.2d 185, on which defendant here heavily relies, are distinguished on the basis the drug paregoric is not considered a narcotic under the provisions of the then existing Ohio statutes. It is undisputed here that Robitussin A-C and Elixir Terpin Hydrate and Codeine are narcotics under our statutory definitions.

II. Defendant strongly argues the provisions of chapter 204 regarding record keeping requirements are so vague,

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indefinite and open to conjecture that enforcement violates the first essential of due process.

In Lever Brothers Co. v. Erbe, 249 Iowa 454, 467, 468, 87 N.W. 2d 469, 478, we quote from State v. Coppes, 247 Iowa 1057, 1061, 1062, 78 N.W.2d 10, 13, 14, these established rules: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. (Citation.)

"* * * The legislature * * * must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. * * * It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. * * *"

However, a statute is not so vague and uncertain as to be void where the meaning of words used can be fairly ascertained by reference to similar statutes, other judicial determinations, reference to the common law, to the dictionary, or if the words themselves have a common and generally accepted meaning. Powers v. McCullough, 258 Iowa 738, 746, 140 N.W.2d 378, 384, and citations.

Applying the foregoing principles, we must reject the contention the statute is so vague and indefinite as to violate due process.

III. Defendant contends here, as he did before the trial court, that section 204.8(5) takes certain narcotic drugs entirely out of the purview of the chapter. We do not agree. The plain wording of that section says only that narcotic preparations of a certain strength shall not be subject to the administering, dispensing and selling provisions of the chapter. It says nothing about any exemption from record keeping, licensing or the penalty provisions of the chapter. Record keeping is entirely separate from administering, dispensing or selling. It is unreasonable to assume the legislature in the definition of narcotics included Robitussin A-C and Elixir Terpin Hydrate and Codeine as narcotics and then by section 204.8(5) took such preparations out of all provisions contained in chapter 204.

The next pertinent part of section 204.9 provides: "In *every* case the record of *narcotic drugs received* shall show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received * * *." (emphasis added). We are not impressed with defendant's argument that the board's failure to prescribe a particular form for keeping such a record provided him some excuse for not keeping a record.

"Every" means each one of all. 15 Words and Phrases, Perm. Ed., pages 792-794. It has substantially the same meaning as "all" which is later used in the same section. In Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 121, 137 N.W.2d 900, 904, we say: "The word 'all' is commonly understood and usually does not admit of an exception, addition or exclusion." (citations).

The last paragraph of section 204.9 includes this: "The keeping of a record required by or under the federal narcotic laws containing substantially the same information as is specified by this chapter, shall constitute compliance with

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this section * * * ". The plain meaning of this phrase is that section 204.9 requires records to be kept as does the federal law.

It is interesting to note defendant apparently knew and understood he was required to keep a record of his purchases and sales of Robitussin A-C as upon the request of the inspectors he without any protest or questions handed over to them some invoices and his registry book. Both the prior and present statutes require keeping of records of narcotics bought by a pharmacist. We find nothing in the legislative history of the statute to support defendant's claim he was not required to keep a record of such narcotics as Robitussin A-C or Elixir Terpin Hydrate and Codeine which are sold as a cough syrup.

We conclude the exemption provided in section 204.8(5) does not apply to the record keeping requirements of section 204.9. Defendant's assigned errors 1, 5, 6, 7 and 8 are not grounds for a reversal.

IV. Defendant's assigned errors 2 and 3 are based on claimed lack of qualifications of the witness Raaz to conduct the audit or accountability survey. Defendant argues vigorously because Raaz had not attended an accountability survey school sponsored by the federal government until after completion of the audit he was not qualified to make the audit or prepare exhibit 1, the audit report which became a part of the records of the pharmacy board. Assigned errors 2 and 3 are without merit. Raaz testified he had worked with Wheeler and other registered pharmacists and had attended many in-office critiques or instructions regarding the two items being audited and that the audit or survey was done by reviewing the invoices and registry produced by defendant and counting his stock on hand. The audit or survey consisted of simple mathematical calcula-

tions and setting out the results thereof in a report to the board. Attendance of a federally sponsored accountability school would not be required to carry out such an audit or survey.

V. Cross-examination of Paul Crews, secretary of the pharmacy board, by defendant's counsel includes:

"Q. We have Robitussin, which is a Class 'X' exempt, right, for prescription? A. That is correct.

"Q. And you are telling me it has sixteen times more in it than a regular dosage of codeine? A. Your comparison here is not quite a fair one.

"Q. Well, that's what I was thinking. That's the comparison you made. A. For the reason you are referring to a single dose of codeine by itself, and this particular formulation has four grains of codeine in that four ounce bottle.

"Q. Mixed with other— A. Mixed with other medicinals, right.

"Q. That's why it's Class 'X', and a prescription isn't required, isn't that right? A. It is exempt from the prescription requirement only. It is not exempt from any of the other requirements.

"Q. But it says it is a Class 'X' exempt drug, doesn't it? A. Meaning exempt from the prescription requirement."

Crews' redirect examination includes:

"Q. Mr. Crews, Class 'X', that classification is a federal classification? A. That is correct.

"Q. And the term exempt, which is on the Robitussin A-C, means exempt from prescription requirements? A. That is correct.

"Q. Does that also mean exempt from record keeping under the Iowa rule?

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"Mr. Rockwell: Objected to as calling for an opinion and conclusion of the witness, and for the further reason it is leading.

"The Court: He may answer, if he knows the answer.

"A. All other record keeping requirements must be maintained as to the receipts of the drug at the time of purchase, and at the time of the sale of the drug."

Defendant asserts the trial court erred "in permitting State's witness, Paul Crews, to testify as to the the law". The obvious answer to this contention is that defendant first on cross-examination inquired about the applicable law and thereby opened the door for further such inquiry on redirect. The trial court's ruling was correct.

58 Am.Jur., Witnesses, section 562, page 315, states: "A party may not complain of incompetent evidence brought out on redirect examination of a witness, to explain incompetent testimony elicited on cross-examination." Similar statements of the general rule are found in 98 C.J.S., Witnesses, section 419b.

Hofacre v. Monticello, 128 Iowa 239, 245, 103 N.W. 488, 490, states: "The matter was brought out on cross-examination, and plaintiff had the right to re-examine with respect thereto. The question, no doubt, called for an opinion or conclusion of the witness, or rather for a comparison by him; but in view of the nature of the cross-examination and of the answer given by the witness we are not inclined to interfere with the discretion of the trial court in such matters." We have consistently recognized this rule. Castner v. Wright, 256 Iowa 638, 647, 127 N.W.2d 583, 588, 128 N.W. 2d 885; State v. Finnegan, 244 Iowa 166, 172, 55 N.W. 2d 223, 226; Glatstein v. Grund, 243 Iowa 541, 549, 51 N.W. 2d 162, 168; State v. Rohn, 140 Iowa 640, 646, 119 N.W. 88, 91.

VI. Defendant's remaining assigned error is "The court erred in imposing the sentence which it imposed upon this defendant". He argues he was sentenced pursuant to section 204.20(4) which provides: "For violation of the provisions of this chapter concerning the manufacturing, selling, administering to another person, or dispensing a narcotic drug, the imposition or execution of sentence shall not be suspended and probation or parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served."

The record discloses defendant was sentenced on the verdict finding him guilty of failure to keep records in violation of section 204.9 and pursuant to section 204.20(1) which provides: "Any person violating any provision of this chapter, except as otherwise provided shall upon conviction be fined not more than two thousand dollars and shall be imprisoned in the state penitentiary not less than two or more than five years. * * *." We find nothing in the record indicating the trial court felt obliged to follow section 204.20(4).

Defendant does not specifically argue the penalty imposed is too severe but this must be inferred from his contention that section 204.20(4) was followed by the trial court. It is our duty to carefully consider whether the punishment imposed is too severe. Code section 793.18. We have, however, consistently held that where the judgment imposed does not exceed the statutory maximum, it is only where an abuse of the trial court's discretion in fixing punishment is shown that we will interfere. State v. DeRaad, ... Iowa ....., 164 N.W.2d 108, 112; State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280; State v. Kulish, 260 Iowa 138, 145, 148 N.Y.2d 428, 433.

The punishment imposed here is within the maximum under section 204.20(1). We must presume the trial court

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took all the facts developed in the course of the trial and the entire picture presented into consideration in fixing the sentence. State v. Kramer, 252 Iowa 916, 921, 922, 109 N.W.2d 18, 21. We find no abuse of the court's discretion.

Finding no reversible error, the judgment of the trial court is—Affirmed.

All Justices concur except Rawlings, J., who takes no part.

1966 Code of Iowa

(Chapter 204)

• • • • •

204.5 Sales on written orders.

1. A duly licensed manufacturer or wholesaler may sell and propagate narcotic drugs to any of the following persons, but only on official written orders:

a. To a manufacturer, wholesaler, pharmacist, or pharmacy.

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2. An official written order for any narcotic drug shall be signed in triplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or propagates the narcotic drug or drugs named therein. Upon the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of five years in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this chapter. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the federal narcotic laws, respecting the requirements governing the use of order forms.

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204.6 Sales by pharmacists.

1. A pharmacist, in good faith, may sell or dispense narcotic drugs to any person upon a written prescription order of a medical practitioner properly executed, dated, and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the

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drug is dispensed, and the full name, address, and registry number under the federal narcotic laws of the person prescribing, if he is required by those laws to be so registered. If the prescription order is for an animal, it shall state the species of animal for which the drug is prescribed.

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3. The pharmacist dispensing an oral or written prescription order under this section shall write the date of dispensing and his own signature on the face of the prescription order. The oral or written prescription order shall be retained in a separate file by the proprietor of the pharmacy in which it is dispensed for a period of five years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this chapter. The oral or written prescription order shall not be renewed.

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204.8 Preparations exempted.

1. The board may by regulation exempt from the application of this chapter to the extent it determines to be consistent with the public welfare, pharmaceutical preparations of narcotic drugs found by the board after due notice and opportunity for hearing:

a. Either to possess no addiction-forming or addiction-sustaining liability, or to possess such slight addiction-forming or addiction-sustaining liability as to create little risk of improper use, and

b. Not to permit recovery of a narcotic drug having such liability, with relative technical simplicity and degree of yield as to create a risk of improper use.

2. In exercising the authority granted in subsection 1 of this section, the board, by regulation and without special findings, may grant an exempt status to such pharmaceutical preparations of narcotic drugs as are or may be determined to be exempt under the federal narcotic laws and regulations and permit the administering, dispensing, or selling of such preparations under conditions and by persons the board may prescribe.

3. If the board shall determine that any exempt preparation does possess a degree of addiction liability that, in its opinion, results in abusive use, the board shall by regulation publish its determination. The determination shall be final and the exempt status shall cease to apply to such preparation sixty days after the publication date of the determination.

4. Pharmaceutical preparations of narcotic drugs exempted from this chapter shall be subject to the following conditions:

a. The preparation administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.

b. The preparation shall be administered, dispensed, or sold in good faith as a medicine, and not for the purpose of evading the provisions of this chapter.

c. Only a pharmacist shall sell at retail or dispense such a preparation.

5. Except as otherwise provided, this chapter shall not apply to the administering, dispensing, or selling of any

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preparation containing not more than one grain (64.8mg.) of codeine, or any of its salts, per one fluid ounce (29.5729 c.c.) or per one avoirdupois ounce (28.3 gms.), when such pharmaceutical preparations of narcotic drugs are administered, dispensed, or sold by persons and under conditions prescribed by the board. [C39, §3169.08; C46, 50, 54, 58, 62, §204.8; 61GA, ch. 195, §8]

Referred to in §204.17, subsection 7

204.9 Records to be kept. Medical practitioners, manufacturers, wholesalers, pharmacies, pharmacists, hospitals, laboratories, and every person who purchases for resale or who sells narcotic drugs, shall keep such records as may be required by the board relating to receipt, manufacture, inventory, distribution, including dispensing, administering, sale, or other disposition, and information as to narcotics stolen, lost, or destroyed. In every case the record of narcotic drugs received shall show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from processes of manufacture. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered, or dispensed and the kind and quantity of drugs.

Every such record shall be kept for a period of five years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws containing substantially the same information as is specified by this chapter, shall constitute compliance with this sec-

tion, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft. [C39, §3169.09; C46, 50, 54, 58, 62, §204.9; 61GA, ch. 195, §9]

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204.17 Fraud or deceit.

1. No person shall obtain or attempt to obtain a narcotic drug or procure or attempt to procure the administration of a narcotic drug:

a. By fraud, deceit, misrepresentation, or subterfuge.

b. By the forgery or alteration of a prescription order or of any written order.

c. By the concealment of a material fact.

d. By the use of a false name or the giving of a false address.

2. Information communicated to a medical practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

3. No person shall willfully make a false statement in any prescription order, report, record, or order required by this chapter.

4. No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacy, pharmacist, medical practitioner, or other authorized person.

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5. No person shall make or utter any false or forged prescription order or false or forged written order.

6. No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

7. The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section 204.8, in the same way as they apply to transactions under all other sections. [C39, §3169.17; C46, 50, 54, 58, 62, §204.18; 61GA, ch. 195, §17]

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1962 Code of Iowa

(Chapter 204)

UNIFORM NARCOTIC DRUG ACT

Section 204.8 Preparations Exempted.

Except as otherwise in this chapter specifically provided, this chapter shall not apply to the following cases:

Administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce, not more than one grain of codeine or of any of its salts.

The exemption authorized by this section shall be subject to the following conditions:

1. That the medicinal preparation administered, dispensed, or sold shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone; and

2. That such preparation shall be administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this chapter.

Nothing in this section shall be construed to limit the quantity of codeine or of any of its salts that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or sold in compliance with the general provisions of this chapter.

Nothing in this section shall be construed to permit any person to prescribe, administer, compound, dispense, or sell any of the preparations included herein, except those persons duly qualified under this chapter to engage in the distribution of narcotics.

1962 Code of Iowa

Section 204.9 Records To Be Kept.

1. Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application shall keep a record of the quantity, character and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

2. Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them in accordance with the provisions of subsection 5 of this section.

3. Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

4. Every person who purchases for resale, or who sells narcotic drug preparations exempted by section 204.8, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection 5 of this section.

5. The record of narcotic drugs received shall in every case show the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced, and the proportion of resin contained in or producible from the plant Cannabis sativa L., received or produced. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered, or dispensed, and the kind and quantity of drugs. Every record shall be kept for a period of two years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed or stolen, if any; the kind and quantity of such drugs and the date of the discovery of such loss, destruction or theft.

6. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided in section 687.7.